

## “Defensive Efforts”

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Joining a slew of trial lawyer bills that sought to increase recoverable damages and otherwise expand liability under state consumer protection law, increase liability for tortious death or injury of pets, raise the limits on noneconomic damages in wrongful death litigation, and unduly expand the state’s False Health Claims Act. The lead paint bill failed to pass before the legislature adjourned.

### New York

Though the Empire State’s economy is in shambles and Albany is awash in red ink, many state lawmakers there, led by personal injury lawyer and Assembly Speaker Sheldon Silver, have nonetheless seen fit to push litigation legislation that can only drive more businesses to bankruptcy and more jobs out of state.

Arguably the most onerous of several such bills are A. 8646 and S. 5768, companion bills still pending in respective Assembly and Senate committees at press time. The legislation would create a new private right of action under the state’s securities law known as the Martin Act. Currently, only the state attorney general can bring lawsuits against mutual funds and other such financial entities for acts of negligence. This mind-boggling proposal would increase the statute of limitations to six years from the date of discovery but would not require plaintiffs to show “reliance” on the defendants’ conduct.

### Michigan

Personal injury lawyers again managed to get their desired repeal of Michigan’s longstanding products liability defense for makers of federally approved prescription drugs through the House in Lansing this year. But like last year, the radical bill, H.B. 4316, appears to have stalled in the Senate where cooler heads understand that the mere introduction of such legislation in previous years has already cost the economically ravaged state thousands of 21st century jobs.

### Illinois

The Land of Lincoln is sometimes derisively referred to as the Land of Lawsuits, and for good reason. With Cook, Madison and St. Clair counties routinely cited in ATRA’s annual Judicial Hellholes report, it should come as no surprise that trial lawyer lobbyists are a formidable presence in Springfield.

But with the state’s entire political universe currently consumed by a gaping budget deficit and the desire to enact good-government reforms in the wake of former Gov. Rod Blagojevich’s federal indictment, the list of litigation legislation was relatively short. The most threatening bill, S.B. 184, would have awarded prejudgment interest to accrue from the date a defendant was served with written notice of a claim for damages. To his credit, the bill’s chief sponsor, Sen. William Haine, withdrew the bill when representatives of the Illinois Civil Justice League and others explained how it could work to coerce defendants into unjust settlements and

otherwise help drive businesses and jobs from the state.

### Wisconsin

In the case of the Badger State, it wasn’t lawmakers with whom trial lawyer lobbyists had the most success. Rather it was Gov. Jim Doyle who was convinced to hijack the state budget bill, A.B. 75, by inserting unrelated provisions that, among other things, would have reinstated joint and several liability for defendants found to be less than 51 % at fault, as long as the defendant’s fault exceeded that of the plaintiff.

Doyle’s proposal would have allowed plaintiffs’ attorneys to target minimally liable defendants with deep pockets. Wisely, both the Assembly and Senate removed the governor’s handiwork from the budget bill before final passage.

### California

Like New York, only much worse, California is facing an unfathomable record budget deficit and losing businesses, jobs and productive residents hand over fist. Yet certain lawmakers in Sacramento remain beholden to the trial bar and persist with a litany of liability-expanding legislative proposals, any and all of which can only expedite the formerly Golden State’s pending financial collapse.

One such bill that made it all the way to Gov. Arnold Schwarzenegger’s desk before being terminated by his veto pen would have indefinitely lengthened the statute of limitations on fair pay claims. (WARNING: Legislators in many statehouses are now determined to move similar state versions of the federally enacted “Lilly Ledbetter Fair Pay Act.”)

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As noted above, not all state trial lawyer bills were defeated this year. Here are a few that have or probably will become law:

### California

Staying in California, observers in Sacramento suggest at press time that Gov. Schwarzenegger is likely to sign into law a pending bill that would ban the use of the chemical bisphenol A (BPA) in plastic baby bottles and formula containers, even though the U.S. Food and Drug Administration, the European Union and the Canadian government, among others, have found use of the chemical to be safe. Since California is already home to at least 14 of the 29-and-counting BPA class action lawsuits filed nationally, most of which make no claims of actual injury, expect a new rush of litigation as prospecting trial lawyers look to strike it rich.

### Oregon & Washington

Moving up the Pacific Coast, both Oregon and Washington have attracted increasing attention from the personal injury bar in recent years. This year the two states’ legislatures were inundated with dozens of liability-expanding bills, and the trend is expected to continue. If there’s any good news, it’s that trial lawyer lobbyists only got one such bill enacted into law in each state in 2009: steadily increasing tort liability limits through 2014 in Oregon, and a broad expansion of state consumer protection law with plenty of new incentives for tort lawyers in Washington.

### Iowa

Turning inward to the heartland, Iowa caved in to become the last state in the union to provide a private right of action in otherwise expanding its own consumer protection law, which, incidentally, contains vague definitions of fraud and does not require a plaintiff to prove that the defendant intended fraud.

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As noted above, the litigation industry is relentless and can be expected to increase its legislative branch lobbying efforts next year. ATRA’s own Defensive Efforts campaign will work to counter the trial bar. For information about how you can help and the latest legislative updates, visit ATRA’s specialized and publicly accessible website, [www.defendingtortreform.com](http://www.defendingtortreform.com).

## Corporate Fraud

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internal audit to compare customers’ and vendors’ names and to review unusual transactions between them.

### • Management Micromanaging

Pay close attention when executives with a hands-off management style suddenly take a particular interest, especially in routine transactions or when a large deal is critical to meeting objectives. Audit committees can gain insight by asking questions of management, corporate counsel, internal audit, and the external auditors.

Audit committees should fully understand business strategies and rationalizations for current acquisitions in this difficult environment, especially

if debt financed. Companies that depend on acquisitions to achieve revenue and/or other earnings targets could face intense pressures when the market turns lower.

### Practice Prevention

While current economic conditions can foster fraudulent behavior, companies can deter it by implementing appropriate prevention, detection and response plans. And when senior executives promote an ethical tone at the top environment, such plans can set an expectation for employees to do the right thing in the right way.

It is critical in difficult economic times for the corporate overseers to understand a company’s financial health and where the enterprise is susceptible to fraud. After all, what you don’t know is what gets you in trouble.

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## Partners Notes

### Protiviti’s Enhanced GRC Solution Enables Sustainable Compliance Management

Protiviti Inc., a global business consulting and internal audit firm, announced the release of the Governance Portal™ version 3, a software solution to manage governance, risk and compliance (GRC). The Governance Portal integrates Protiviti’s proprietary content and consulting expertise with commonly accepted governance frameworks to establish a comprehensive platform that gives organizations the visibility and insight they need to manage and mitigate critical risk and compliance issues.

The latest release of the Governance Portal enables all key elements of a GRC program, including the following:

- Management can define the appropriate policies and procedures and then map them across the enterprise to understand the impact of policy changes and to drive certification.

- Risk and control self-assessments support real-world scoring techniques that help organizations consider both quantitative and qualitative drivers of risk, including financial loss, business continuity, regulatory impact, reputational exposure and human resources.

- An integrated survey feature makes it easy to involve stakeholders – including employees and suppliers – in the assessment process while continuously updating underlying elements of the risk and control framework.

- An event and loss management capability facilitates the collection of

actual, external and virtual loss data and supports integration with third-party source systems. Loss data can be recorded in local currency and converted to the base currency based on historical exchange rates.

- Key indicators enable organizations to measure both performance and risk, giving them more confidence to aggressively pursue their corporate objectives while still managing risk.

- The audit management capability includes enterprise risk assessment, scheduling and resource management, execution, reporting and monitoring/follow-up. Auditors are also able to complete fieldwork while disconnected from a server or the Internet. Audits are performed against the central risk and control register while allowing auditors to secure their detailed audit work. This interaction contributes to management’s overall GRC perspective while maintaining independence of the audit.

- Issues and action plans are contributed to a central repository from all GRC communities within the organization, thus providing a single platform for managing all findings across the enterprise.

- A reporting engine provides management with an integrated outlook for decision making that balances performance with assessment of risks.

For more information visit [www.protiviti.com](http://www.protiviti.com).